

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

YVONNE BENSON,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

CSA 8 099 246

DOCKET NUMBER
SF-844E-99-0151-I-1

DATE: September 24, 1999

Murray Posin, Esquire, Las Vegas, Nevada, for the appellant.

Neale Ainsfield, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has petitioned for review of an initial decision (ID) issued February 19, 1999, that reversed its reconsideration decision that denied the appellant's application for disability retirement under the Federal Employees' Retirement System (FERS). For the reasons discussed below, we DENY OPM's petition for review set forth at 5 C.F.R. § 1201.115, and REOPEN this appeal pursuant to 5 C.F.R. §1201.118, VACATE the initial decision, and REMAND the case to the Western Regional Office for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed an appeal from an OPM reconsideration decision that denied her application for a disability retirement annuity. OPM found that, although the medical evidence showed that the appellant became disabled after she retired, it did not show that she became disabled while serving under the Civil Service Retirement System (CSRS).^{*} OPM found further that the appellant resigned from her position to move from Alaska to Nevada to take care of her terminally ill father-in-law, and not because she could not perform the duties of

^{*} We note that OPM's decision erroneously referred to CSRS rather than FERS. However, because both FERS and CSRS require a disability to occur while employed in a covered position, the error is not material. 5 C.F.R. §§ 831.1203(2), 844.103(2).

her position. On appeal, the appellant argued that she became disabled before she retired and submitted a physician's letter to that effect. Initial Appeal File (IAF), Tab 1. In addition, the appellant's appeal stated the following:

[W]e request that your office reverse the earlier decisions and award Ms. Benson her benefits. In the alternative, our office request [sic] that a hearing be held in this matter so that Ms. Benson has a [sic] opportunity to present her case properly.

IAF, Tab 1.

¶3 OPM filed its response containing its "relevant" documentary record on the appellant and stated that it would file a further response "as the proceeding progresses." IAF, Tab 4. Without holding a hearing or announcing a closing of the record, the administrative judge (AJ) issued her initial decision. The AJ found that the appellant's request for a hearing was provisional. ID at 2. She found further that, based on the written record, the appellant prevailed. *Id.* Specifically, the AJ found that the appellant submitted a persuasive letter from her physician dated December 1, 1998, that stated that the appellant's condition took years to manifest and that he could state within a reasonable degree of certainty that the degenerative changes were with her prior to her resignation on October 2, 1996. IAF, Tab 1; ID at 3. Based on this letter, the AJ found that it was more likely true than not true that she was disabled prior to her retirement. Thus, the AJ reversed OPM's reconsideration decision.

ANALYSIS

¶4 On petition for review (PFR), OPM asserts that the AJ committed prejudicial error by failing to set a close-of-record date as required by 5 C.F.R. § 1201.58. OPM argues that, upon receipt of its file record that was submitted in response to the acknowledgment order, the AJ essentially issued a summary judgment in favor of the appellant. OPM contends that the AJ's actions precluded it from fully presenting its case.

¶5 Here, the AJ failed to set a close-of-record date. Furthermore, even though the appellant requested that OPM's decision be reversed or in the "alternative" a hearing be held, the AJ failed to advise the parties that a hearing would not be held and that the appeal would be decided on the record. Moreover, the December 21, 1998 acknowledgment order clearly advised the parties that, in the event a hearing was not requested, the parties would be "given an opportunity to make written submissions before the record on your appeal closes." IAF, Tab 2 at 2. Thus, it was not clear to the parties that the appeal would be decided on the record and that all necessary evidence and argument had to have been submitted prior to the issuance of the decision being issued. *Cf. Howard v. Department of Commerce*, 22 M.S.P.R. 606, 608-610 (1984) (where the AJ closed the record without notice to the parties no harmful error was shown since the parties were on notice that the appeal would be decided on the record, that Board policy provided for issuance of the decision within 120 days of the date the appeal was docketed, and neither party submitted additional evidence into the record following the agency's response to the petition for appeal). This was error.

¶6 On PFR, OPM has submitted two separate medical opinions by two Board Certified Occupational Medicine Specialists that were completed within a week or two of the issuance of the ID. Petition for Review File (PFRF), Tab 1. These medical opinions raise arguments challenging the appellant's medical evidence supporting her claim for disability retirement and finding that the appellant's medical evidence failed to show that she was disabled when she resigned on October 2, 1996. PFRF, Tab 1. This evidence directly challenges the outcome of the appeal; OPM's inability to present this evidence was inconsistent with the AJ's specific notice to the parties that they would be provided with the opportunity to make written submissions before the record closed if the appeal was decided without a hearing. IAF, Tab 2. Although it may appear that the record before us is complete, it is not. Because the appellant has not had the

hearing she requested, and because OPM has raised arguments and presented evidence on PFR which the appellant should have had the opportunity to address, we find that it is necessary to remand this appeal to the Western Regional Office to provide the appellant with the opportunity to submit additional documentary information into the record and/or obtain the hearing she requested. In light of our decision to remand the appeal for further proceedings, we need not address OPM's contention that the AJ erred by failing to address all of the requirements for disability retirement. PFRF, Tab 1.

¶7 Finally, OPM requests that on remand the case be reassigned to a different AJ for adjudication because the AJ's rulings show that she is biased. PFRF, Tab 1. The party claiming bias must show that it constitutes extrajudicial conduct rather than conduct arising in the administrative proceedings before the AJ, and the fact that the AJ ruled against the party, even erroneously, is not sufficient evidence to show bias. *Mitchell v. Department of the Treasury*, 68 M.S.P.R. 504, 508 (1995). OPM's assertion that the AJ is biased because she initially ruled in favor of the appellant without closing the record or holding a hearing does not establish extrajudicial conduct, and does not overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Id.* Thus, OPM's request is denied.

ORDER

¶8 Accordingly, we remand the case to the Western Regional Office for further proceedings, including a hearing, and a new adjudication consistent with this Opinion and Order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

